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In the Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. .....

GENEVA METAL WHEEL COMPANY,
Petitioner,

vs.

EDWARD P. O'DONNELL,
UNITED STATES CASUALTY COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Sixth Circuit.

Petitioner prays that a Writ of Certiorari issue to review the judgment and order upon petition for rehearing of the United States Court of Appeals for the Sixth Circuit, the judgment of said court having been entered on May 25, 1950, and the order on rehearing having been entered on November 17, 1950.

OPINIONS BELOW.

The opinion of the District Court is unreported. It appears in the Record, pages 267-269. The original opinion of the Circuit Court of Appeals is reported in 183 F. 2d 733. It also appears in the Record, pages 309-317. The order denying rehearing, in effect a supplemental opinion, is not reported. It appears in the Record, pages 335-336. All briefs filed in the court below have been bound together and are filed in this Court.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 25, 1950 (R. 307), and the order on rehearing was entered on November 17, 1950 (R. 335). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1). This petition is filed within the statutory period under 28 U. S. C. Section 2101 (c).

QUESTIONS PRESENTED.

1. Where proven facts give equal support to each of two inconsistent inferences, neither of them being established, must not judgment, as a matter of law, go against the party whose right to recover rests upon the necessity of sustaining one of these inferences as against the other?

2. In a negligence action, if the cause of plaintiff's injury, may be as reasonably attributed to an act for which defendant is not liable as to one for which he is liable, has the plaintiff sustained the burden of showing that his injury is a proximate result of the negligence of the defendant?

STATEMENT.

Geneva Metal Wheel Co. of Geneva, Ohio, makes wheelbarrow wheels for sale only as a custom-made product to wheel-barrow manufacturers (R. 22). The wheel-barrow maker incorporates the wheel as a component part of the finished product and prefers that there be no name on the wheel (R. 23). Petitioner's model D C-285-P wheel is not patented (R. 13). It bears no name or number identifying the maker. The wheel is designed to take a pneumatic tire to be inflated to 60 pounds (R. 27). Each part of the wheel is individually inspected twice at each step of the manufacturing process (R. 37).

On May 16, 1944, respondent O'Donnell was an employee of the Grand Central Service Station at Chicago, Illinois. He was engaged in repairing a Firestone tire and

tube, which he had demounted from a wheel-barrow wheel. He patched the tire, mounted the tube and casing on the wheel, and began to inflate the tube. The proprietor of Wittig Coal Co., owner of the wheel, had instructed O'Donnell to inflate to 48 pounds of air (R. 163). The tire had a capacity of 60 pounds (R. 27).

O'Donnell was using an air hose from an unrestricted source (R. 60), having a minimum pressure of 120 pounds and a maximum pressure of 180 pounds (R. 57, 60). The compressor tank had a capacity of 500 pounds. The pump worked automatically. The safety valve was set at 200 pounds (R. 58). O'Donnell knew that the air hose he was using was connected to a tank having 120 pounds pressure (R. 188, 189). The air hose used by O'Donnell had no control valve (R. 60), which necessarily resulted in the compressed air rushing into the small tire under terrific pressure. The hoses in the yard outside the service station were equipped with regulating control valves (R. 59). These were available for O'Donnell's use.

While O'Donnell was inflating the tire, the wheel suddenly disintegrated and flew apart, striking his face and head causing serious and permanent injuries. He has prayed for damages of $203,900. After once applying the air hose to the valve, respondent removed the hose and applied a hand gauge, which showed the pressure in the tire to be between 18 and 20 pounds (R. 162). He again applied the air and again gauged the pressure, finding it to be 25 to 30 pounds (R. 163). He intended to apply 48 pounds pressure. The tube gets hard very fast (R. 163). O'Donnell has no memory of what happened after the second time he gauged the tire (R. 185). Respondents concede that there was an appreciable lapse of time before the wheel broke, for at page 2 of their main brief in the Circuit Court, we find:

> "In a matter of seconds, after he had gauged the pressure a second time, the wheel disintegrated."

Petitioner's D C-285-P wheel was made of steel, constructed to withstand a pressure of 120 pounds. Several hydrostatic tests had been made in which the average bursting pressure was 150 pounds (R. 227). The range of bursting pressure was 130 pounds to 160 pounds (R. 237).

Respondent's Exhibit 7, the Firestone casing which had been on the wheel, was examined by a sales engineer of that company. He testified that the tire had been used for approximately 1,000 miles (R. 225).

O'Donnell's complaint alleged that the petitioner manufactured the wheel, causing injury, and sold it to The Lansing Co. of Michigan. The last wheel sold by petitioner to The Lansing Co., before O'Donnell was hurt, was shipped on May 19, 1942, approximately two years before the accident (R. 218). It was stipulated that respondents' Exhibit 7, the Firestone tire, was made in the third quarter of 1941 (R. 218).

Respondents' evidence of negligence was supplied by two engineers. One expert first saw the wheel which injured O'Donnell about two months after the accident, when he picked it up at the gas station (R. 72, 73). The other expert first saw the wheel two days before the trial in the District Court, which was about five years after the accident (R. 46).

The wheel was made of two halves, shaped somewhat like pie pans, held together back to back by six ferrules or hollow rivets. The experts testified that of the six ferrules one was thicker and, therefore, stronger than the other five. No test was made of the strength of any ferrule (R. 110, 156, 157). These witnesses assumed that the strongest ferrule was standard; that the other five were below standard and, therefore, concluded that they were defective.

O'Donnell had the wheel in his hands while repairing the tire. The wheel looked perfect to him (R. 180).

At the end of all the evidence, the District Court granted defendant's motion and directed a verdict for the defendant in that court, petitioner here. At the time the

verdict was directed, the District Court gave a brief opinion, from which we quote the following (R. 269):

> "Conceding that the exhibited wheel halves are the remains of the wheel upon which the plaintiff was working when he was hurt, an examination of the rivets or ferrules and the nature of the distortion of the body of the disc and the holes through which the rivet ends were pulled, seems to me to evidence and support a finding that the application of excessive air pressure rather than failure due to defective manufacture caused the violent separation of the wheel assembly."

The Circuit Court reversed the judgment in favor of petitioner and remanded the case to the District Court for a new trial. The decision of the Circuit Court was quite evidently based upon the assumption that the Supreme Court had changed the well-established law preventing a jury from speculating upon a choice of probabilities. In its opinion in this case, the Circuit Court said (R. 316):

> "See *Pennsylvania Railroad v. Goldie*, 6 Cir., 182 F. 2d 9, where Judge Simons has, in the light of the most recent decisions of the Supreme Court, delineated the functions of the jury to pass upon issues of fact, and the function of the court to determine whether there is substantial evidence to submit such issues to the jury."

In the *Goldie* case, the Circuit Court said in its opinion at page 12:

> "It is true that the cases cited are all cases involving the Federal Employers' Liability Act, 45 U. S. C. A. § 51 et seq. We see, however, no difference in principle in differentiating the function of the court from that of the jury between cases under that act and cases otherwise arising in the federal courts involving actions for damages due to negligence. With rules applicable to cases arising under state law and tried in local courts, we have no present concern."

Upon a petition for rehearing filed in the Circuit Court, the question was reconsidered. The court below filed an order denying petition for rehearing which, at the same

time, constituted an opinion supplementing the original opinion. In the supplemental opinion, which was not published but appears in the Record at page 335, the Circuit Court said:

> "The rule with respect to the function of judge and jury, as outlined in *Pennsylvania Railroad v. Goldie, supra,* is here inapplicable, and the citation of that case as authority in disposing of the issues presented by appellee was improvident.
>
> In this case, the law of Ohio controls. In the latest adjudication of the Ohio Supreme Court on the subject that has come to our attention, it is held that it is not sufficient for a plaintiff to prove that the negligence of a defendant might have caused an accident; if the cause of the injury to a plaintiff may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has not sustained the burden of showing that his injury is a proximate result of the negligence of the defendant. *Gedra v. Dallmer,* 153 Ohio St. 258. This rule, however, in no way alters the conclusions heretofore expressed in the opinion of this court on the appeal in this case."

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals Erred:

1. In holding that the jury should be permitted to conjecture or guess, where the evidence presents no more than a choice of probabilities as to whether the wheel broke because of defective manufacture or because of the application of excessive air pressure.

2. In ignoring the applicability of state law and basing its reported opinion (183 F. 2d 733) upon its own decision in *Pennsylvania R. R. v. Goldie,* 182 F. 2d 9, wherein it cites and follows Supreme Court decisions in Federal Employers' Liability Act cases and says that:

> "With rules applicable to cases arising under state law and tried in local courts, we have no present concern."

3. In holding in its order denying petition for rehearing that, although Ohio State law as announced in *Gedra v. Dallmer*, 153 O. S. 258, controls, nevertheless plaintiff's case must be submitted to a jury, even though he has not excluded the effectiveness of those causes for which defendant is not legally responsible.

4. In failing to follow the applicable law as announced in *Pennsylvania R. R. Co. v. Chamberlain*, 288 U. S. 333, at 339, 340.

5. In failing to follow applicable Ohio law as announced in *Gedra v. Dallmer*, 153 O. S. 258.

6. In following the inapplicable rule announced in its own decision in *Pennsylvania R. R. v. Goldie*, 182 F. 2d 9 and inapplicable Supreme Court decisions in Federal Employers' Liability Act cases referred to therein.

7. In failing to follow its own prior decisions in *Parker v. Gulf Refining Co.*, 80 F. 2d 795 *et al.*

8. In reversing the District Court.

9. In denying our petition for rehearing.

REASONS FOR GRANTING THE WRIT.

1. The District Court was of the opinion that the wheel broke because of the application of excessive air pressure rather than failure due to defective manufacture. That court followed the rule regarding choice of probabilities announced in *Pennsylvania R. R. Co. v. Chamberlain, supra.* Indeed the third headnote of the opinion in that case is the source of our first Question Presented in this petition. The Circuit Court ignored the holding in *Pennsylvania R. R. Co. v. Chamberlain, supra.* Instead it has treated this instant case, which arises under Ohio common law, as though it were a Federal Employers' Liability Act case.

The Federal Employers' Liability Act departs from the accepted common law followed in Ohio in such vital points as assumption of risk, contributory negligence, comparative

negligence, etc. The Act reveals Congress' intent to give railroad workers the benefit of a jury trial in claims against their employers as a substitute for workmen's compensation. That was specifically held in *Bailey v. Vermont Ry. Co.*, 319 U. S. 350, at page 354.

2. This case involves only local law as interpreted by the highest courts of Ohio. Federal Courts in dealing with questions of local law are bound to follow decisions of the appropriate state court. *Erie R. R. Co. v. Tompkins,* 304 U. S. 64.

Ohio law applicable to this case was recently announced in *Gedra v. Dallmer, supra.* In Ohio the syllabus of the case states the law. *State v. Hauser,* 101 O. S. 404 at 407. The syllabus of *Gedra v. Dallmer* is as follows:

> "1. In a negligence action, it is essential for recovery that plaintiff prove by a preponderance of evidence not only that defendant was negligent, but also that defendant's negligence was a direct or proximate cause of plaintiff's injury.
>
> 2. In a negligence action, it is not sufficient for plaintiff to prove that the negligence of defendant might have caused an injury to plaintiff but, if the injury complained of might well have resulted from any one of several causes, it is incumbent upon plaintiff to produce evidence which will exclude the effectiveness of those causes for which defendant is not legally responsible.
>
> 3. In such an action, if the cause of an injury to a plaintiff may be as reasonably attributed to an act for which defendant is not liable as to one for which he is liable, the plaintiff has not sustained the burden of showing that his injury is a proximate result of the negligence of the defendant."

Our second Question Presented is based upon the third syllabus of the *Gedra* case. The Circuit Court in its order denying petition for rehearing recognizes that *Gedra v. Dallmer* states the law applicable to the instant case. However, the Circuit Court fails to apply that law to the facts of our case and says:

> "This rule, however, in no way alters the conclusions heretofore expressed in the opinion of this court in the appeal of this case."

It is apparent that the Circuit Court persists in the conclusion it reached when it announced it was relying upon *Pennsylvania R. R. Co. v. Goldie, supra,* wherein it held that rules applicable to cases arising under state law and tried in local courts were of no concern.

The Circuit Court acknowledges that two inferences could be drawn from the facts in the instant case. That is the only basis upon which that court can recognize the applicability of the *Gedra* case. Since there were two inferences which could be drawn from the facts, the Circuit Court should have applied the *Gedra v. Dallmer* rule and entered final judgment for petitioner.

3. The Circuit Court has decided the instant case at variance with its own prior decisions on the point of choice of probabilities, particularly *Parker v. Gulf Refining Co.,* 6 Cir., 80 F. 2d 795, and *O'Mara v. Pennsylvania R. R. Co.,* 6 Cir., 95 F. 2d 762.

4. If this case is tried again in the District Court, confusion will certainly follow. The District Court is obliged to apply Ohio law as announced in *Gedra v. Dallmer, supra.* That law is in harmony with the Federal decision in *Pennsylvania R. R. Co. v. Chamberlain, supra.* See also *Galloway v. United States,* 319 U. S. 372, wherein the Supreme Court discussed the function of the trial court to determine whether there is substantial evidence to submit the issues to the jury. We quote from the opinion at page 395:

> "Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

Yet the Circuit Court which reviews any decision the District Court may make has in effect nullified the force of

the decisions mentioned. This situation arises because of the Circuit Court's confusion over law applicable to Federal Employers' Liability Act cases, with law applicable to the instant case arising under Ohio common law, wherein the facts present a choice of probabilities. This is one of those cases where the Supreme Court should review the ruling of the Circuit Court, "inasmuch as it is fundamental to the further conduct of the case." *U. S. v. General Motors,* 323 U. S. 373, 377; *Hanover Milling Co. v. Metcalf,* 240 U. S. 403, 408-9; *Forsyth v. Hammond,* 166 U. S. 506.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JAMES A. BUTLER,

KENNETH D. CARTER,

Counsel for Petitioner.

February 9, 1951.

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In the Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 550.

GENEVA METAL WHEEL COMPANY,
Petitioner,

vs.

EDWARD P. O'DONNELL,
UNITED STATES CASUALTY COMPANY,
Respondents.

BRIEF OF RESPONDENTS
In Opposition to Petition for Writ of Certiorari.

MEYER A. COOK,
605 National City Bank Building,
Cleveland 14, Ohio,

REES H. DAVIS,
400 National City Bank Building,
Cleveland 14, Ohio,
Attorneys for Respondents.

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